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**CHARLES ELMORE GRIFFLEY
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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1947 TERM**

**NEW AMSTERDAM CASUALTY
COMPANY,**

Petitioner,

vs.

**CRAIGHEAD RICE MILLING
COMPANY, A CORPORATION,**

Respondent.

No. 778

**J. M. JACK AND L. M. JACK, A
CO-PARTNERSHIP DOING BUSI-
NESS AS JACK CONSTRUCTION
COMPANY,**

Petitioners,

vs.

**CRAIGHEAD RICE MILLING
COMPANY, A CORPORATION,**

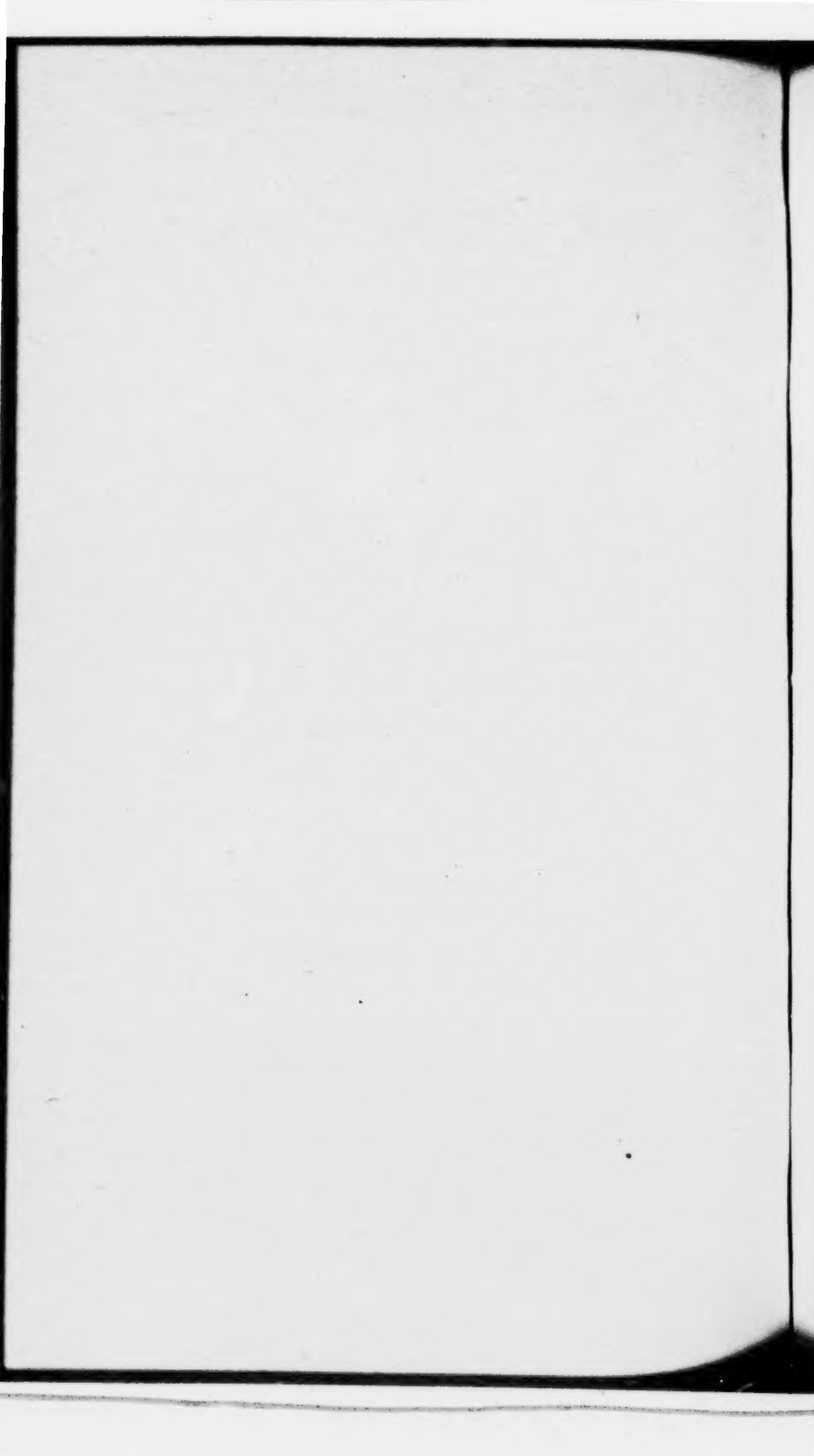
Respondent.

No. _____

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

✓
LOWELL W. TAYLOR,
Commerce Title Building,
Memphis, Tennessee,
Counsel for Petitioners.

✓
ARTHUR L. ADAMS,
Jonesboro, Arkansas,
of Counsel.



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No. _____

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

**TO THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:**

Petitioners, New Amsterdam Casualty Company and J. M. Jack and L. M. Jack, a co-partnership doing business as Jack Construction Company, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eight Circuit, filed March 25, 1948 (R. 1148), which has now become final. The judgment affirmed a judgment against petitioners rendered by the United States District Court for the Eastern District of Arkansas for \$150,000.00.

A.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED.**

The respondent is an Arkansas Corporation. Pursuant to its purpose to enter the rice drying business, it made a contract with Jack Construction Company for the construction of a reinforced concrete drier building, with storage tanks and rice drying machinery. The contract price was \$350,000.00. Petitioners executed a bond in the full amount of the contract price, conditioned to respond in damages for the failure of the contractor to perform his contract in accordance with the contract, plans and specifications. The contractor entered upon the execution of the contract, and almost succeeded in completion, but not within the time prescribed. After he had furnished labor and materials and rice drying machinery in excess of \$344,220.00 (R. 1090) and had turned over to respondent two of the rice drying units, which respondent accepted and used, respondent declared the

contractor in default. Respondent called upon the New Amsterdam Casualty Company, surety, to complete. It declined to complete, availing itself of a reservation in the bond. Respondent did not complete, but brought suit against the New Amsterdam Casualty Company for the full amount of the penalty of the bond.

The respondent did not make the contractor a party to the suit. The contractor filed a petition to intervene on September 20, 1946 (R. 32).

After the case was at issue, and on November 4, 1946, petitioners' counsel took the pre-trial deposition of an official of the Union Planters National Bank and Trust Company at Memphis, Tennessee. Among the papers and documents produced for examination was an instrument by the terms of which the respondent had assigned all of its claims and causes of action on the bond to the Bank (R. 1091 & 1119-1121). The assignment contained the following:

"Whereas, the undersigned is indebted to the Union Planters National Bank & Trust Company in the amount of Two Hundred and Eighty Thousand (\$280,000.00) Dollars by way of a loan the proceeds of which have been or will be used in the construction and completion of said plant;

Now, Therefore, in order to further secure said Union Planters National Bank & Trust Company, the undersigned hereby absolutely assigns unto Union Planters National Bank & Trust Company, its successors and assigns, any and all claims, actions or causes of action which it may now or hereafter have against the New Amsterdam Casualty Company under the terms and provisions of said performance and payment bond together with any and all moneys which the undersigned may at any time

receive from or for the account of the said New Amsterdam Casualty Company in payment or satisfaction of its obligation under said bond as well as all rights which the undersigned may now or hereafter have to receive from or for the account of said New Amsterdam Casualty Company any moneys in payment or satisfaction of its obligation under said bond; and the said Union Planters National Bank & Trust Company, its successors and assigns, shall have full and complete right to institute and prosecute in its name or in the name of the undersigned any suit or action at law or in equity against the New Amsterdam Casualty Company to enforce performance and payment by it of its obligations under said bond; * * * (R. 1120-1121).

The assignment further provided that the Bank would not bring suit on the bond prior to default on the part of respondent in the payment of its indebtedness to the Bank, and attempted to reserve to itself the right to sue, and provided that upon payment of \$30,000.00 of its indebtedness to the Bank, the Bank should release the assignment. It also contained the following provision:

“* * * and it is further understood that until such time as the undersigned may have defaulted in the payment of its debt to Union Planters National Bank & Trust Company no notice of this assignment will be given the New Amsterdam Casualty Company.” (R. 1121).

The Surety promptly filed an amendment to its answer, and alleged that the assignment had been made, and attached a copy and pleaded the assignment as a bar to recovery. It expressly pleaded and relied upon the following condition precedent in the bond:

“Provided, however, that this Bond is executed and accepted upon the following express conditions,

each of which shall be a **condition precedent** to any right of recovery hereon, anything in the contract to the contrary notwithstanding:

Sixth. That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of anyone other than the Obligee herein named; and that the obligation of the Surety is, and shall be construed strictly as, **one of suretyship only**; that this Bond shall be executed by the Principal before delivery, and that it shall not, **nor shall any interest or right of action thereon, be assigned without the prior written consent of the Surety,* * *** (R. 19 & 21).

Respondent replied to the amendment to the answer and admitted the assignment; but it attempted to avoid its effect by averring that the assignment was by way of pledge; that its claim against petitioner was assignable under the laws of the State of Arkansas, and that the provision against assignment contained in the bond was against public policy and void. (R. 56).

The Surety moved for a summary judgment based upon the assignment in violation of the condition precedent in the bond (R. 59). The District Judge took the motion under advisement, but did not act upon it. After the case had been tried before the jury and at the conclusion of all of the evidence, the Surety moved for a directed verdict. The District Judge overruled that motion, and gave his reason as follows:

"The Court: On the question of the assignment clause, the Court is going to hold that the assignment does not render this contract invalid. The Court is of the opinion that to hold to the contrary would be against public policy." (R. 891).

This defense was urged in the Circuit Court of Appeals (Petitioners' brief in that Court, 8, 9, 19, 33-40). Petitioners also insisted in the Circuit Court of Appeals that if the District Court was correct in holding that the provision prohibiting assignment was void the inevitable result was that any claim or cause of action against petitioners was vested in the Bank, and that the respondent had no right to maintain the action.

Petitioners do not understand the reasoning of the Circuit Court of Appeals and are unable to state it. It is deemed better to quote all that portion of the opinion dealing with this question.

"The contentions of the defendants are directed largely to the ruling of the court in denying the motion of New Amsterdam Casualty Company for a directed verdict. This motion is brief and reads as follows:

'We move for a directed verdict in favor of the New Amsterdam Casualty Company upon the ground that the plaintiff made an assignment of the bond and of its claim on the bond in violation of the terms of the bond, and upon the ground that the plaintiff failed to give the surety notices, as required by the bond of the alleged defaults upon which this suit is predicated.'

It seems to have been the contention of defendants in the trial court, and they renew the contention here, that the assignment of this bond as a pledge or collateral security, had the effect of invalidating it. In overruling the motion for a directed verdict, the court, among other things, said:

'On the question of the assignment clause the court is going to hold that the assignment does not render this contract invalid.'

It is observed that there is no suggestion in this motion that the assignment was effective, and hence, the plaintiff was not the real party in interest. Nor does the original brief of defendants in this court contain any such suggestion. But it is contended that this assignment violated the terms of the bond, and hence, the bond was invalid. The provision which we have before set out must be considered as a whole. It provides that no right of action shall accrue for the use or benefit of any other than the obligee therein, and that no interest or right of action thereon may be assigned without the written consent of the surety. The assignee is not attempting to maintain this action, and hence, we are not called upon to determine what right, if any, it acquired by reason of this assignment. Certainly, if the assignment conveyed no interest or cause of action to the assignee that right continued in the obligee of the bond, the plaintiff in this action. There is nothing in the provision indicating that it was intended to affect the rights of the obligee, and the assignee is not here asserting any rights under the alleged assignment. The only assignment relied upon was one which pledged this bond as surety for the payment of money. This was in the nature of a mortgage. (Citing cases)." (R. 1139-1140).

B.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the effect of the holding of the Circuit Court of Appeals is to deprive the Surety of its right to contract and to stand upon its contract as written.
2. Whether a court has the authority and power to refuse to enforce the plain and unambiguous terms of the

contract which are not prohibited by the constitution, by statutes, or by public policy, and do not result from any accident, fraud or mistake.

3. Whether the District Court and the Circuit Court of Appeals had the power and authority to impose a \$150,000.00 liability in the face of respondent's agreement that it would have no right of recovery upon the bond if it made an assignment of its claim on the bond, and respondent's admission that it assigned its claim prior to the institution of the suit, and that the breach of the condition precedent existed at the time the suit was filed.

4. Whether the Circuit Court of Appeals should have sustained the Surety's motion for a directed verdict predicated upon the violation of the condition precedent in the bond, by the execution of the assignment.

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court Appeals has so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. In refusing to enforce the provisions of the bond as written, the Circuit Court of Appeals clearly departed from the accepted and usual course of judicial proceedings and sanctioned the action of the District Court in so doing.

4. The effect of the holding of the Circuit Court of Appeals that respondent could recover despite the admitted assignment, and despite respondent's agreement that it would have no right of recovery if it made the assignment, is the decision of an important question of general law in a way untenable and probably in conflict with the weight of authority and the decisions of this Court.

5. If, for any reason, the condition of the bond be void or inapplicable, the District Court did not have jurisdiction because the assignee Bank was, in that event, the real party in interest, and therefore an indispensable party.

The questions presented are important because they strike at the heart of every person's right to contract and to be protected by the provisions of the contract. They are of unusual importance to the public, because (a) a Circuit Court of Appeals has held (in this case) that it is not bound to enforce a contract which has no infirmity,—it is believed that that is the effect of the decision—(b) it has failed to follow the decisions of this Honorable Court, and (c) if, for any reason the condition precedent against assignment is void, then the Circuit Court of Appeals has permitted a Federal District Court to award a judgment when the latter court was without jurisdiction because of the absence of an indispensable party,—the assignee being the real party in interest.

PRAYER FOR WRIT.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review on a day certain to be therein named a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket "No. 13607, New Amsterdam Casualty Company, a corporation, Appellant, v. Craighead Rice Milling Company, a corporation, Appellee" and "No. 13608, J. M. Jack and L. M. Jack, a co-partnership doing business as Jack Construction Company, Appellants, v. Craighead Rice Milling Company, a corporation, Appellee"; and that said judgment of said United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

LOWELL W. TAYLOR,
Counsel for Petitioners.

ARTHUR L. ADAMS,
Of Counsel for Petitioners.

Certificate of Counsel.

I, Lowell W. Taylor, one of the counsel for the above named petitioners, do hereby certify that the foregoing petition for writ of certiorari is presented in good faith and not for delay.

LOWELL W. TAYLOR,
Counsel for Petitioners.

**BRIEF IN SUPPORT OF
PETITION FOR CERTIORARI.**

MAY IT PLEASE THE COURT—

JURISDICTION.

Petitioner, New Amsterdam Casualty Company, is a corporation incorporated under the laws of the State of New York. Petitioners, J. M. Jack and L. M. Jack are citizens and residents of Kansas City, Kansas. Respondent, Craighead Rice Milling Company, is a corporation incorporated under the laws of Arkansas. The District Court in Arkansas took jurisdiction solely on the diversity of citizenship alleged. A judgment for more than \$3,000.00 exclusive of interest and costs was demanded on the bond sued on. The right of review on certiorari is invoked under Section 347, Title 28 U.S.C.A., and because of a conflict between the decision of the Circuit Court of Appeals in this case and decisions of this Court, and because that court exceeded its power and authority in failing to enforce the contract.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court in each of the cases.
2. In holding that the respondent's suit was not barred by reason of the breach of the condition precedent in the bond prohibiting assignment of any interest in the bond or any claim under it.

3. In failing to hold that the District Court was without jurisdiction by reason of the absence of an indispensable party if it was right in holding the provision in the bond invalid or inapplicable.

4. If this petition is granted petitioners will desire to raise two other questions, viz. (1) there is a minimum of \$58,960.00 (R. 325-326) and a maximum of \$90,545.78 (R. 539-540) included in the judgment for waterproofing above grade, not required by the contract, plans or specifications. There is a minimum of \$35,000.00 and an indefinite maximum included as a penalty for damages for delay, despite the undisputed evidence that no actual damage resulted from delay in completion. It is not deemed proper to burden the Court with these questions unless and until the writ is granted.

ARGUMENT.

The Violation Of The Condition Precedent Barred A Recovery.

It is petitioners' contention that the Circuit Court of Appeals exceeded its authority and its jurisdiction when it refused to enforce the condition precedent in the bond, by the terms of which respondent agreed that it would have no right of recovery if it made an assignment of the bond or of its claim on it. The Supreme Court of Arkansas and this Honorable Court have repeatedly held that the courts must enforce an unambiguous contract as it is written in the absence of a constitutional or statutory prohibition if the contract is not against public policy or the result of accident, fraud or mistake.

In **Edwards v. Anderson** (1923), 161 Ark. 665, 252 S. W. 908, at page 913, the Supreme Court of Arkansas said:

"But the court cannot make contracts for the parties and must enforce them as they are written. The contract under review is a very harsh one, judged by the financial hardships which have overwhelmed the appellant, because of his failure or inability to comply with its terms; but it is not claimed by the appellant that any fraud was perpetrated upon him by the appellee by which he was induced to enter into the contract. As was said by Judge Riddick, speaking for this court in *Carpenter v. Thornburn*, 76 Ark. 578-582, 89 S.W. 1047, 1049:

'The contract may be a harsh one, but it contravenes no rule of public policy. The parties made it, and the courts cannot alter it.'

In that case we quoted the following from Prof. Pomeroy:

'It is well settled that when the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. * * * It is also equally certain that, when the contract is made to depend upon a condition precedent—in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times—then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent.' 1 Pomeroy, Equity, 445.

Now the parties to this contract expressly make time the essence thereof and provide for a forfeiture in case of a failure upon the part of appellant to comply with the terms of the contract as to payment, or to comply with the conditions therein provided.

(2) 2. Such is the law."

The opinion is not reported in the Arkansas reports, and we have therefore quoted from the Southwestern Reporter.

In **Clouston v. Maingault** (1912), 105 Ark. 213, 150 S.W. 858, the Court said:

“* * * and the Court can neither eliminate nor supply nor rearrange the words and sentences in the unambiguous contract, but must construe it as the parties have made it.” 105 Ark. at page 217.

In **Twin City Pipe Line Co. v. Harding Glass Co.** (1931), 283 U.S. 353, 51 S. Ct. 476, 75 L. Ed. 1112 this Honorable Court said:

“The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made **shall** be held valid **and enforced** by the courts.” 283 U.S. at page 356.

As early as 1841 the Supreme Court of Arkansas went so far as to hold that where the right of action depends upon the performance of a condition precedent, by the plaintiff, and the declaration omits to allege performance, the omission is incurable, by verdict. **Childress v. Foster**, 3 Ark. 252, at page 259.

In **Bankers Surety Company, et al. v. Watt** (1915), 118 Ark. 492, 177 S.W. 20, the Supreme Court of Arkansas denied a recovery to the obligee in a performance bond because the obligee failed to comply with a condition precedent.

In **Imperial Fire Insurance Company v. Coos County** (1894), 151 U.S. 452, 14 S. Ct. 379, 38 L. Ed. 231, this Honorable Court said:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage, upon the terms and conditions agreed upon, **and upon no other**, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms." 151 U.S. 452, at page 462.

Nothing can be found in the Federal Constitution or in the Arkansas Constitution or in the Federal Statutes or in the Arkansas Statutes prohibiting the surety from requiring the obligee to agree that it would not assign the bond or its claim on it. No claim is made that respondent made that agreement as a result of any fraud, accident or mistake. The provision does not contravene any public policy.

The decision of the Circuit Court of Appeals holding that the provision in the bond is contrary to public policy is in conflict with numerous decisions of this Court, including the following:

Steele v. Drummond (1927), 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238, wherein it was held that even an agreement to procure the passage of city ordinances for the benefit of the contracting parties was not contrary to public policy.

Twin City Pipe Line Co. v. Harding Glass Co. (1931), 283 U. S. 353, 51 S. Ct. 476, 75 L. Ed. 1112, holding that a contract by which one party agrees to take all of its supply of gas does not contravene the public policy of Arkansas prohibiting perpetuities and monopolies. In so holding the Court said:

“The glass company has failed to show that the contract has any tendency to injure the public, and no reason appears why it should not be enforced according to its terms.” 283 U. S. at page 358.

Advance-Rumley Thrasher Co. v. Jackson (1932), 287 U. S. 283, 53 S. Ct. 133, 77 L. Ed. 306, wherein it was said that a legislative act declaring a contract to be contrary to public policy can only be justified by the existence of exceptional circumstances.

Muschany v. The U. S. (1945), 324 U. S. 49, 65 S. Ct. 442, 89 L. Ed. 744, holding that the United States could not escape responsibility on contracts entered into by it upon the ground that they were contrary to public policy, saying:

“No other case has come to our attention which has declared that a commission or purchase contract is invalid on the ground of public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal v. Philadelphia*, 2 How (US) 127, 197, 198, 11 L ed 205, 233, 234. As the term ‘public policy’ is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.” 324 U.S. at page 66.

Petitioners contend that the writ should be granted because of the conflict between the decision of the Eighth Circuit Court of Appeals and the foregoing decisions of this Court. **St. Paul F. & M. Ins. Co. v. Bachmann** (1932), 285 U.S. 112 at page 115, 52 S. Ct. 270, 76 L. Ed. 648 at page 652.

The Arkansas Statutes, **Pope's Digest, Section 512**, and **Chapter 118 Acts of Arkansas 1945**, making the in-

struments designated therein assignable are simply enabling statutes making certain instruments assignable which were not assignable at common law. No Arkansas statute prohibits the parties to a contract from agreeing that no right of action will accrue thereon if it be assigned.

Respondent relied on three Arkansas cases holding that the provision against assignment does not apply to any assignment made after the loss has accrued.

In **McBride v. Aetna Life Insurance Co.** (1917), 126 Ark. 528, 191 S.W. 5, relied on by respondent, the claim on the policy was not assigned until after it had been liquidated and had become a judgment debt.

In **Garetson-Greaseon Lumber Co. v. Home Life & Accident Co.** (1917), 131 Ark. 525, 199 S.W. 547, the claim on the policy was not assigned until after the insured had obtained a judgment on its claim and that judgment had been affirmed on appeal.

In **National Mutual Casualty Co. v. Cypret** (1944), 207 Ark. 11, 179 S.W. (2d) 161, the policy did not prohibit assignment.

Respondent also contended in the Circuit Court of Appeals that the prohibition against assignment does not apply to an assignment as collateral security. No Arkansas case was cited. Respondent said it found none.

Petitioners do not know whether the Circuit Court of Appeals intended to hold that the provision does not apply to an assignment as collateral security. If it did the decision is in conflict with the holding of this Honorable

Court in **Portugese-American Bank v. Welles** (1916), 242 U.S. 7, 37 S. Ct. 3, 61 L. Ed. 116. In that case Welles sought to impress a lien on a debt due by the City of San Francisco to a contractor then in bankruptcy. The contractor had made an assignment of the debt, **as collateral security for a loan**, but not until it had been approved for payment by the city auditor. The contest was between Welles, a sub-contractor, asserting a statutory lien, and the Bank, holding a prior assignment. Welles conceded his lien to be subordinate if the assignment was valid. He relied on a provision in the contract, between the City and the contractor, which prohibited an assignment of any money due under the contract. This Court recognized the right of the City to rely on the provision against assignment, saying:

“There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee,—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U.S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308.” 242 U.S. at page 11.

The Court's only concern was with the right of a stranger to rely upon it. The opinion emphasizes the fact that the City did not object to the assignment, but stood indifferent, willing that the common law should take its course. The Court recognized the rule that the provision against assignment was inserted for the benefit of the City, but said the reason was not important on the facts before the Court.

Assignment of claims against the Government is prohibited by Act of Congress. U.S.C.A. Title 41, Section 15. The reason for such prohibition has been stated by this Court in **Hobbs v. McLean** (1886), 117 U.S. 567, 6 S. Ct. 870, 29 L. Ed. 940, as follows:

“ * * * The sections under consideration were passed for the protection of the Government. **Goodman v. Niblack**, 102 U.S. 556. They were passed in order that the Government might not be harrassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed **and a settlement made.** * * * ” 117 U.S. 567, at page 576.

This should be a complete answer to the holding that the prohibition is contrary to public policy. In the case at bar the principal and surety desired to protect themselves from claims or suits against one or more assignees, and they desired that in the event the contractor could not complete, because of reason beyond his control or otherwise, the owner would retain his desire to have a completed structure and minimize his damages by completion. By the provision the Surety protected itself from just such a situation as this. It did not want an owner to accept a structure which it admitted under oath was worth more than \$350,000.00 (R. 1110), borrow all it could on its claim on the bond, lose interest in completion, and sue for the full penalty of the bond, and insist upon a penalty of \$100 per day for the time it would take somebody to complete. In this case the respondent's President testified that if he had not had the bond he would have completed the building (R. 112).

Any contention that the provision does not apply to an assignment as collateral security seems also to be

answered by the wording of the bond. That provision is not limited or restricted, but reads,—

“* * * nor shall **any** interest therein, or right of action thereon, be assigned * * *” (R. 21).

The case of **Sheridan v. Pacific State Fire Insurance Co.** (1923), 107 Ore. 285, 212 Pac. 783, cited in the opinion of the Circuit Court of Appeals recognized the validity of a provision against assignment, but held that the instrument before it for consideration was not an assignment but might be construed to give the person holding the instrument some kind of lien on the proceeds. The Court said:

“* * * It will be seen that by its terms it does not attempt to assign the policy, and no actual assignment is shown.” 212 Pac. 783, at page 784.

No other case cited by the Circuit Court of Appeals dealt with a contractual provision against assignment.

It can be safely asserted that no decision can be found holding that where the parties agree that the bond is one of suretyship only and that no assignment shall be made, such a provision does not apply to the assignment of a claim for unliquidated damages or that it does not apply to an assignment as collateral security. The surety is as much exposed to a suit by a bank holding the assignment as collateral security as it is where the bank has an assignment for any and all purposes.

The fallacy in the opinion of the appellate court lies in treating the prohibition against assignment as ineffective and therefore cannot be relied upon to defeat the claim. But the question is not whether the assign-

ment was prohibited, but whether as a condition precedent the Surety had the right to make its liability depend upon the non-assignment,—whether for a collateral purpose or otherwise. The language is, “* * * nor shall any **interest** (in the bond) be assigned without consent of the Surety.” The condition was in the nature of a promissory warranty, and being violated invalidated the contract of suretyship under its terms.

**If Provision With Respect to Assignment Be Invalid
or Inapplicable, the District Court Had
No Jurisdiction.**

If petitioners are wrong with respect to all of the foregoing it immediately appears, and the inevitable result is, that the Court did not have jurisdiction. If the provision against assignment is void for any reason, then the assignment is, under Arkansas law, valid. The assignment divested respondent of all its claim on the bond and vested it in the Bank. The Bank immediately became the real party in interest, and was required by Rule 17(a) Federal Rules of Civil Procedure, and Pope's Arkansas Digest, Section 1305, to bring suit in its own name. See:

Arkansas Valley Smelting Co. v. Belden Min. Co. (1888), 127 U.S. 379, 8 S. Ct. 1308, 32 L. Ed. 246, holding that if the assignment had been valid the assignee would be the real party in interest and sustaining defense that the contract could not be assigned;

Falvey v. Foreman-State National Bank (1939), CCA 7, 101 F. (2d) 409, holding that under Federal Equity Rule 37 (now Rule 17(a) Federal Rules of Civil Procedure) the assignee is the real party in interest and dismissing suit by the assignor;

Where the assignment is for collateral security the assignee is the real party in interest,—**2 Moore Federal Practice** (1938), page 2053;

In **Love v. Cahn** (1909), 93 Ark. 215, 124 S.W. 259, it was held that an equitable assignee of a claim on a supersedeas bond (containing no prohibition against assignment) was the real party in interest within the meaning of the Arkansas Statute.

The Bank was an indispensable party. Its absence as a party plaintiff deprived the Court of jurisdiction.

Strawbridge v. Curtis (1857), 7 U.S. 267, 3 Cranch 267, 2 L. Ed. 435;

Coirin v. Millaudin (1857), 60 U.S. 113, 19 How. 113, 15 L. Ed. 575;

Smith v. Lyon (1890), 113 U.S. 315, 10 S. Ct. 303, 33 L. Ed. 635;

Niles-Bement-Pond Co. v. Iron Moulders Union (1920), 254 U.S. 77, 41 S. Ct. 39, 65 L. Ed. 145;

U.S. v. Hellard (1944), 322 U.S. 363, 64 S. Ct. 985, 88 L. Ed. 1326;

Mine Safety Appliances v. Forrestal (1945), 326 U.S. 371, 66 S. Ct. 219, 90 L. Ed. 140.

That the respondent intended to assign all its claim on the bond and was therefore an indispensable party is certain. Contemporaneously with the execution of the assignment the attorney for and Secretary-Treasurer of respondent company executed an affidavit in support of the application for the additional loan containing the following:

“At any rate we consider the buildings and real estate, spur tracks, pumps and appliances to be worth at present more than \$350,000.00, and with anticipated additional expenditures and work the cost and value will exceed \$375,000.00 or \$380,000.00.” (R. 1110).

Shortly prior to the assignment respondent wrote the Bank that the building was near to completion, but that it would take \$2,000.00 or \$3,000.00 additional to complete the building (R. 1121-1122). At the time the assignment was made respondent certainly did not contemplate recovering anything like \$30,000.00 for the cost of completion. Even if respondent and the Bank both had the right to sue, still the Bank was an indispensable party.

If for any reason the prohibition against assignment in the bond is void, then petitioners have been exposed to a lawsuit by the Bank ever since the assignment was made, and, insofar as this record shows, are still exposed to such a suit. Even giving effect to the attempt to postpone the right of the Bank to sue until default in the payment of respondent's indebtedness to the Bank, all that respondent has to do to expose petitioners to such a suit is to make default either voluntarily or involuntarily.

With respect to this the Circuit Court of Appeals said:

"* * * The assignee is not attempting to maintain this action, and hence, we are not called upon to determine what right, if any, it acquired by reason of this assignment." (R. 1140).

It would seem that if that court held the provision against assignment invalid or inapplicable it became immediately called upon to determine whether the assignee bank was an indispensable party and whether the Court had jurisdiction.

WHEREFORE, petitioners pray that the writ be issued.

LOWELL W. TAYLOR,

ARTHUR L. ADAMS,
Of Counsel.